applicable FCC rule, and in most cases, there is in fact another applicable rule with longer deadlines.

That is certainly true of all FCC proceedings involving comparable "fact-based" inquiries of the type that would be at issue under subparagraph (iv). Under the Commission's cable leased access rules, for example, cable operators have 30 days to respond to a petition filed against them. 47 CFR § 76.975(e). Similarly, parties have 30 days from public notice to file petitions to deny or to intervene in hearing proceedings. See, e.g., 47 CFR § 1.223. Imposing the 10-day catch-all deadline of Section 1.45(a) on a proceeding that all parties agree will be intensely fact-based is, NLC and NATOA submit, unprecedented and patently unfair to local governments. They should be given, at a minimum, at least 30 days to respond to a wireless provider's petition.

B. Only The Specific Wireless Provider That Participated In the Local Government Proceedings and Was Denied Relief Should be Able To Petition the FCC for Relief, But The Public and Other Interested Parties Should Be Allowed To Participate In the FCC Proceedings.

In response to the NPRM's request for comment (at ¶ 150) on the meaning of an "adversely affected" party entitled to petition the Commission for relief and on which parties should be allowed to participate in the proceeding, some industry commenters improperly seek to have it both ways. On the one hand, several industry comments believe individual members of the public and public interest groups should not be allowed to participate at all. See, e.g., AT&T Comments at 7; GTE Comments at 10;

BellSouth Comments 6-7; SWB Comments at 8. On the other hand, a few industry commenters inconsistently believe that other wireless providers besides the petitioning provider, as well as industry organizations like PCIA and CTIA, should be allowed to participate in petition proceedings under subparagraph (iv). See Ameritech Comments at 7; Primeco Comments at 18.

Allowing additional industry members to participate in subparagraph (iv) proceedings, while prohibiting the public and other interested local governments and local government associations like NLC and NATOA from participating, would be patently biased and unfair. That such proposals would even be made raises serious doubts about the sincerity of industry commenters in this proceeding. As noted in Part III(A) above, many local governments are small and lack resources to battle on even terms with industry at the FCC. Moreover, to the extent that, as Primeco suggests, other industry members should be allowed to participate because they would be affected by the precedential effect of FCC decisions, the same is certainly true of other local governments and the members of organizations like NLC and NATOA. Accordingly, the FCC should allow other local governments and organizations like NLC and NATOA to participate in proceedings.

We also believe that the public and public interest organizations should be allowed to participate. As the City of New York points out (at 5-6), all citizens are affected by health and safety matters such as RF emissions. Given the current

public distrust of industry and the FCC on these matters that the record reveals, shutting the door on public participation would only serve to fan the flames of that distrust.

At the same time, we agree with BellSouth (at 6) that only the particular wireless provider that participated before a local government and was aggrieved by its adverse decision should be allowed to petition the FCC under subparagraph (iv). If a local government grants a provider's siting request, disappointed constituents of the local government should not have standing to challenge the local government's decision before the FCC. They should, however, be allowed to participate in FCC proceedings supporting the local government's position; indeed, in some cases citizens may have participated actively before the local government and have valuable additional evidence to contribute to support the local government's decision.

C. While the Commission Should Endeavor To Resolve Disputes Expeditiously, It Should Not Rush To Judgment On Inherently Fact-Based Inquiries Based on Arbitrary, Self-Imposed Deadlines.

Several industry commenters urge the Commission to act on subparagraph (iv) petitions within a fixed period of time -- typically thirty days.[16] While, as a general matter, NLC and NATOA certainly favor prompt resolution of disputes, we believe that a fixed time limit -- particularly one as short as thirty days -- is ill-advised.

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[16] See Primeco Comments at 16; PCIA Comments at 5; US West Comments at 23.

As an initial matter, except in the statutorily required case of open video system certifications, we are unaware of any other FCC proceedings where by rule the Commission has adopted such a self-imposed deadline. Certainly no basis for such special, indeed preferential, treatment of wireless providers by the FCC can be found in Section 332(c)(7) or its legislative history. Indeed, since Congress clearly wanted to "prevent[] Commission preemption" in most cases (Conference Report at 207), and did not want to require local governments to give wireless providers preferential treatment (id. at 208), it would be odd for the Commission to reallocate its staff and resources to give wireless providers such preferential treatment here. Since Commission resources are relatively fixed, allocating additional resources to wireless provider petitions to meet FCC self-imposed deadlines can only have the effect of delaying the Commission's ability to respond to requests and applications by other parties before the FCC -- broadcasters, cable operators, leased access providers and wireline telecommunications providers -- that would lack such preferential status. Yet, as we have seen, there is absolutely nothing in Section 332(c)(7) or the Telecommunications Act of 1996 as a whole to suggest that Congress thought the FCC's "limited" authority under subparagraph (iv) was somehow more important than the many other tasks assigned to the Commission.

Moreover, we are greatly concerned that an arbitrary, self-imposed decisional deadline might lead to a "rush to judgment," thereby jeopardizing the Commission's ability to render thorough,

fair and accurate decisions. As virtually all commenters agree, subparagraph (iv) petition proceedings will inherently be fact-based. Indeed, as Primeco notes (at 17), they will be adjudicatory in nature. Since the facts -- and their complexity -- will vary in every case, any "one size fits all" decisional deadline would be entirely inappropriate. Indeed, it might well raise serious due process concerns for the individual participants in the proceeding.

In the final analysis, to the extent industry understandably seeks expedited resolution of subparagraph (iv) disputes (and indeed of wireless siting disputes generally), there is a far better solution than the arbitrary deadline for FCC action proposed by industry here: The court remedy provided by subparagraph (v). Unlike the Commission, courts are statutorily required under subparagraph (v) to act "on an expedited basis." And also unlike the Commission, courts have far better fact-finding tools and access to relevant evidence to be able to resolve what all concede will be inherently fact-based, adjudicatory proceedings on an expedited basis.

D. The Strict "Default" Proposals of Primeco and US West Would Single Local Governments Out For More Adverse Treatment Than Other Parties Before the Commission and Should Be Rejected.

Two industry commenters, Primeco and US West, propose that the Commission impose heavy-handed default procedures on local governments. Primeco Comments at 17; US West Comments at 4 & 22. They go so far as to suggest that preemption should occur by

automatic default "immediately after the date for filing oppositions." Primeco Comments at 17.

This proposal is nothing more than a bald and insulting plea for regulatory advantage. As an initial matter, we note that -- just like the proposed national deadline for "failure to act" and GTE's proposal that providers should be able to ignore local laws and construct on the mere filing of petition with the FCC (discussed above) -- having preemption occur immediately based on automatic default is clearly contrary to Congressional intent. A Congress that believed it was "prevent[ing] Commission preemption" except in "limited circumstances" would be surprised to find that the extraordinary act of preemption would instead occur automatically without any formal Commission review or action at all.

Moreover, industry's default proposal is disingenuous. No doubt aware of the unique difficulties local governments face in responding rapidly at the FCC (discussed in Part III(A) above), industry seeks to parlay that handicap to its advantage. The Commission must also keep in mind that the strict default proposal -- like the filing deadlines and FCC decisional deadline proposals discussed in Parts III(A) and (C) above -- would have the effect of encouraging wireless providers to file petitions with the FCC rather than pursuing their court remedy. And as we seen, that is precisely the opposite of the intent of Congress, which clearly envisioned that most disputes would go to the

courts and that FCC proceedings would be the exception rather than the rule. See NLC/NATOA Comments at 5-7.

Finally, contrary to industry's assertions, the strict default proposal is at odds with Commission practice concerning defaults. Under the FCC default rules cited by industry, 47 CFR §§ 1.724(b) and 76.956(e), a party "may be deemed" in default for failing to timely respond; default does not occur automatically. And indeed, in the very Cable Service Bureau decision cited by US West (at 22 n.69) as support for its position, the Bureau did not enter a decision requiring the defaulting cable operator to lower its rates; rather, the Bureau gave the defaulting cable operator an additional thirty days to file its response. See US Cable, DA 97-2096 at ¶¶ 4 & 6 (CSB released Sept. 29, 1997).

It would be odd indeed -- and patently inappropriate -- for the Commission to impose far more strict and harsh default remedies on local governments in subparagraph (iv) proceedings than the Commission routinely imposes on industry in any other class of proceedings. That is especially true with respect to the extraordinary act of preemption.

The industry's strict default proposal should therefore be rejected out of hand. The Commission can, however, learn a lesson from the proposal: It should take industry's proposals generally with a healthy dose of salt, for there can be no doubt that they are largely animated not by any desire to adhere to Section 332(c)(7) or to promote fairness, but instead by a desire

to deceive the Commission into serving as a private police for industry to bludgeon local governments into submission.

IV. INDUSTRY SUPPORT FOR THE NPRM'S RF COMPLIANCE PRESUMPTION PROPOSAL IGNORES THAT COMPLIANCE WITH FCC RF EMISSION STANDARDS IS A STATUTORY PREREQUISITE FOR COMMISSION JURISDICTION.

As expected, industry unanimously supports the NPRM proposal (at ¶ 151) to adopt in subparagraph (iv) proceedings a rebuttal presumption that a provider's facilities are in compliance with FCC RF rules. Yet industry does not anticipate, much less respond to, NLC's and NATOA's argument as to why such a presumption is inappropriate. See NLC/NATOA Comments at 26-29.

Industry simply ignores that compliance with FCC RF emissions is a statutory prerequisite to Commission jurisdiction under subparagraphs (iv)-(v). Particularly in light of Congress' expressed preference for the court remedy, it makes no sense for the Commission to presume away a jurisdictional prerequisite, which can only have the effect of broadening Commission jurisdiction at the expense of the courts, in direct violation of Congress' intent.

Industry also fails to come to grips with the fact that the compliance presumption runs counter to the general rule of presumptions and, indeed, would have the perverse effect of making detection of violations of what are admittedly public safety rules extraordinarily difficult. BellSouth unwittingly confirms this point, making the rather peculiar claim that the presumption is somehow "consistent" with "limiting the amount of

information that a state or local government can request to demonstrate compliance." BellSouth Comments at 7.

The only "consistency" in simultaneously restricting a local government's access to evidence and then placing the burden on the local government in subsequent Commission proceedings is a rather perverse one: It all but ensures that the party that both bears the burden of proof and is affirmatively denied the ability to obtain evidence relevant to carrying that burden will lose. Aside from the obvious fundamental unfairness of such a scheme, it is shocking that such a scheme would be proposed where matters of public safety are at stake.[17]

For similar reasons, we oppose industry suggestions that local governments should be required to bear the costs of showing compliance.[18] The Commission, for example, certainly does not bear the costs of conducting RF tests and environmental assessments that license applicants are required to perform; rather, industry must bear those costs. Given the limited

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[17] Industry, of course, claims that the Commission need not worry because the "severe" penalties that providers face for non-compliance means compliance is "virtually assured." GTE Comments at 8. According to this logic, one would assume that police forces are unnecessary in states that have capital punishment; after all, surely the "severe" penalty of death is sufficient to "virtually assure" compliance with the law. (We note in this regard that executions are becoming more frequent than FCC license revocations.) Perhaps more to the point, the record indicates that wireless providers, albeit perhaps inadvertently, sometimes fail to comply with RF emission requirements. See, e.g., San Francisco Comments at attached Declaration.

[18] See, e.g., Sprint Comments at 15; Primeco Comments at 19; US West Comments at 16.

resources of governments generally, and local governments in particular, shifting the costs of proving compliance with safety requirements from industry to governments is a rather ill-conceived way to protect public safety.

V. THE COMMISSION SHOULD GIVE LOCAL GOVERNMENTS FLEXIBILITY IN REQUIRING PROVIDERS TO DEMONSTRATE RF COMPLIANCE.

Not surprisingly, industry commenters nearly unanimously favor the lesser showing of RF compliance set forth as Alternative 1 in paragraph 143 of the NPRM. They express concern about the supposedly "undue cost and delay" of complying with what industry asserts is (but offers paltry evidence of) a "myriad of differing state and local requirements" concerning RF emission compliance. See Comments of Mark Hutchins. PCIA Comments at 5. US West further argues (at 11) that the more detailed showing of compliance for categorically excluded facilities under Alternative 2 (¶¶ 143-46 of the NPRM) "would have the effect of repealing the Commission's categorical exclusion rules."

Once again, however, industry has overlooked the unique jurisdictional scheme created by Congress in Section 332(c)(7). RF compliance is a statutory prerequisite to Commission jurisdiction under subparagraphs (iv)-(v). Justifications given in other contexts for Commission rules concerning categorically excluded facilities cannot serve as a basis for overriding the statutory requirements of Section 332(c)(7). And in any event, requiring the Alternative 2 showing when requested would not have

the effect of repeating the Commission's categorical exclusion rules: Those rules relieve operators of an otherwise mandatory requirement of performing environmental assessments. In contrast, RF compliance demonstrations under subparagraph (iv) -- whatever their substance -- are not and will not be mandatory in every community. As industry knows (but does not say), the vast majority of local governments across the nation will not demand detailed RF compliance showings of providers.

Moreover, as the record reveals, industry overstates the burden of showing compliance. E.g., Comments of Mark Hutchins. The record also shows that there is a need for local governments to assist the Commission in ensuring that the Commission's RF compliance standards are met. See, e.g., id.; San Francisco Comments; Cellular Phone Taskforce Comments.

In fact, one industry commenter unwittingly provides further evidence of the need for a more effective method of RF compliance demonstration and monitoring. US West rather surprisingly objects even to the mere certification requirement of Alternative 1. US West Comments at 11. US West is apparently unwilling to certify in writing that its categorically excluded facilities meet FCC RF guidelines because "the only way a licensee can be sure that one of its base station/transmitters meets the [FCC's] 'guidelines' . . . is to perform emission calculations or measurements of the facility." Id.

If a wireless provider is indeed unwilling even to so much as certify that its facilities comply with Commission RF emission

standards, then clearly some more effective method of compliance demonstration and monitoring is essential. It is difficult to see how a public concerned about RF emission safety can become anything but even more concerned (and justifiably so) if a wireless provider will not even certify that its facilities meet FCC safety requirements.

Accordingly, the Commission must, at a minimum, allow local governments to require wireless providers to make the more detailed RF compliance showing set forth in ¶¶ 144 and 146 of the NPRM. We also agree with the City of New York (at 5) that Alternative 2 should be modified to require a provider to furnish a local government with any post-FCC license application materials relating to RF emissions that the provider furnishes to the FCC.

In addition, however, the Commission must recognize that there will be occasions when more information is required. This is particularly true given that compliance is in most cases site-specific and the FCC blanket licensing process typically does not require compliance statements or evaluations for a specific facility. See Comments of Mark Hutchins.

The Commission therefore should not limit local governments' flexibility to request additional information beyond that required in Alternative 2. The record shows that such flexibility can be exercised reasonably and responsibly in a manner that both provides the public with an adequate assurance of safety and, at the same time, is responsive to wireless

providers' understandable desire to minimize administrative costs and burdens. See San Francisco Comments and attached Declaration; Seattle City Council Comments at 3.

CONCLUSION

For the foregoing reasons and those set forth in our opening comments, the Commission should (1) conclude that a local decision is not final until all local administrative review procedures have been exhausted; (2) leave to the courts responsibility for reviewing local decisions that are allegedly "partially" based on RF emissions; (3) decline to review any local decision under Section 332(c)(7)(B)(iv)-(v) unless the decision is on its face based on RF emissions; (4) allow local governments as of right to require providers to make the more detailed showing of RF compliance and allow local governments flexibility to request additional information where circumstances warrant; and (5) place the burden on the wireless provider, not the local government, to demonstrate compliance with RF emission requirements in Commission proceedings under Section 332(c)(7)(B)(iv)-(v).

Respectfully submitted,

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